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No. 02-1672

IN THE

Supreme Court of the United States

RODERICK JACKSON,

Petitioner,

v.

BIRMINGHAM BOARD OF EDUCATION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether the private right of action for violations of Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681 *et seq.*, encompasses redress for retaliation for complaints about unlawful sex discrimination.

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45 C.F.R. § 86.71 (1975) 3, 27

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40 Fed. Reg. 24,128 (1975).....27
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65 Fed. Reg. 52,858 (2000).....4, 28
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Black's Law Dictionary (8th ed. 2004).....17
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Department of Justice, *Title IX Legal Manual* (Jan. 11, 2001) <http://www.usdoj.gov/crt/cor/coord/ixlegal.pdf> 23, 28, 38
Discrimination Against Women: Hearings Before the Special Subcomm. on Educ. of the House Comm. on Educ. & Labor, 91st Cong. (1970) 19, 20
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Exec. Order No. 12,250, 45 Fed. Reg. 72,995 (1980).....4, 28
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Hearing on House Concurrent Resolution 330 (Title IX Regulation) Before the Subcomm. on Equal Opportunities of the House Comm. on Educ. and Labor, 94th Cong. (1975) 30
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Floyd D. Weatherspoon, *Don't Kill the Messenger: Reprisal Discrimination in the Enforcement of Civil Rights Laws*, 2000 L. Rev. M.S.U.-D.C.L. 367 .....23, 24
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OPINIONS BELOW

The opinion of the court of appeals is reported at 309 F.3d 1333 (11th Cir. 2002) and is reprinted in the appendix to the petition for a writ of certiorari (Pet. App.) at 1a-26a. The memorandum opinion and order of the district court adopting the report and recommendation of the magistrate judge are unpublished and are reprinted at Pet. App. 27a-33a.

JURISDICTION

The judgment of the court of appeals was entered on October 21, 2002. The court of appeals denied a petition for rehearing and rehearing en banc on January 13, 2003. On March 31, 2003, Justice Kennedy extended the time within which to file a petition for a writ of certiorari until May 13, 2003, and the petition was filed on that date. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves an interpretation of Title IX of the Education Amendments of 1972, the relevant sections of which are codified at 20 U.S.C. §§ 1681 and 1682. The full texts of those statutory provisions, as well as relevant regulations, are set out in appendices to this brief. App., *infra*, 1a-6a & 7a-8a.

STATEMENT OF THE CASE

Petitioner Roderick Jackson brought this action after respondent Birmingham Board of Education deprived him of his coaching position when he raised concerns about unlawful sex discrimination against the girls' basketball team that he coached at a Birmingham high school. At stake in the case is the right of individuals to protect themselves and others against discrimination without fear of reprisal – a right that is critical to the effectiveness of Title IX's prohibition on sex discrimination.

1. The legal question presented is whether the long-recognized private right of action for violations of Title IX encompasses redress for retaliation based on complaints about sex discrimination. Title IX broadly prohibits discrimination on the basis of sex in educational programs and activities that receive Federal financial assistance. The statute provides, in relevant part:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . .

20 U.S.C. § 1681(a). More than 25 years ago, in *Cannon* v. *University of Chicago*, 441 U.S. 677 (1979), this Court held that Title IX's prohibition against discrimination is enforceable through a private right of action.

Title IX also empowers Federal agencies that extend financial assistance to educational programs and activities to promulgate regulations interpreting and implementing the statutory ban on sex discrimination. As relevant here, the statute provides:

> Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity . . . is authorized and directed to effectuate the provisions of section 1681 of this title . . . by issuing rules, regulations, or orders of general applicability . . . .

20 U.S.C. § 1682. The Department of Health, Education, and Welfare (HEW), the predecessor to the current Department of Education, took the lead in promulgating regulations. In its initial regulations, promulgated in 1975, HEW interpreted the statutory ban on discrimination to bar retaliation. Those regulations adopted by cross-reference existing regulations implementing Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d *et seq.*, a parallel statute that prohibits recipients of federal funding from discriminating on the basis of "race, color, or national origin." *See* 45 C.F.R. § 86.71 (1975) (incorporating 45 C.F.R. § 80.7(e) (1975)). The current regulations of the Department of Education are substantively identical to the initial HEW regulations. 34 C.F.R. § 106.71 (incorporating 34 C.F.R. § 100.7(e)). The provision addressing retaliation, entitled "Intimidatory or retaliatory acts prohibited," provides, in relevant part:

> No recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by [20 U.S.C. § 1681] or this part, or because he has made a complaint, testified, assisted, or participated in any manner in

an investigation, proceeding or hearing under this part.

34 C.F.R. § 100.7(e).

Although HEW (and later the Department of Education) has historically taken the lead on substantive interpretation and enforcement of Title IX, since 1980 the Department of Justice (DOJ) has been charged by Executive Order with responsibility for coordinating Title IX implementation and enforcement. Exec. Order No. 12,250, 45 Fed. Reg. 72,995 (1980). In that capacity, DOJ supervised the promulgation, on behalf of itself and 20 other federal agencies, of substantively identical regulations implementing Title IX. 65 Fed. Reg. 52,858 (2000). Those common regulations contain provisions parallel to the Department of Education's regulation interpreting Title IX to prohibit retaliation. *See id.*

2. As described in the amended complaint, and recounted by the court of appeals, petitioner Roderick Jackson has been an employee of the Birmingham school district for over ten years.[1] In 1993, respondent hired petitioner to serve as a physical education teacher and girls' basketball coach. In August 1999, petitioner was transferred to Ensley High School, where he continued to serve as a girls' basketball coach. At Ensley, petitioner discovered that the girls' team was being denied equal funding and equal access to athletic equipment and facilities, including a key to the sports facility. Joint Appendix (J.A.) 10-11; Pet. App. 3a.

The inequitable treatment of the team also adversely affected petitioner as the team's coach. Because the team was not afforded funding, equipment, and facilities

[1] Because the case comes to this Court on review of the dismissal of petitioner's amended complaint for failure to state a claim, the Court must accept the truth of the allegations. *See Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 475 (1999).

equivalent to those offered to boys' teams, petitioner was denied an equal playing field from which to coach. Accordingly, his working conditions were not equivalent to those of other coaches because of different treatment based on sex. *See* J.A. 10-11 (alleging that respondent "refuse[d] to contract with [petitioner] on terms free of gender" and that he "was subjected to adverse terms of employment because of gender discrimination").

In December 2000, petitioner began protesting the unequal treatment of the team to his supervisors. They did not take corrective action. Instead, petitioner received negative work evaluations and ultimately, in May 2001, respondent removed petitioner from his coaching position. J.A. 10-11; Pet. App. 3a.

3. After respondent terminated petitioner's coaching duties, petitioner filed suit against respondent in the United States District Court for the Northern District of Alabama. Petitioner, alleged, *inter alia*, that respondent retaliated against him in violation of Title IX because of his complaints about discrimination against the girls' basketball team and in his terms of employment. J.A. 10-11. Respondent moved to dismiss the case on the ground that Title IX's private cause of action does not encompass claims of retaliation. *See* Pet. App. 31a.

The case was referred to a magistrate judge. The magistrate stated that he found "persuasive" cases from other courts of appeals recognizing a retaliation claim under Title IX. Pet. App. 31a. Nonetheless, the magistrate concluded that he was bound to reject the existence of such a claim by Eleventh Circuit precedent. He explained that the court of appeals had summarily affirmed a prior decision of the district court holding that Title IX does not prohibit retaliation. *Id.* at 31a-32a (citing *Holt v. Lewis*, 955 F. Supp. 1385 (N.D. Ala. 1995), *aff'd*, 109 F.3d 771 (11th Cir. 1997) (Table), *cert. denied*, 522 U.S. 817 (1997)). The district

court adopted the report and recommendation of the magistrate judge. *Id.* at 27a.

4. Petitioner appealed, and the Eleventh Circuit affirmed the dismissal of the complaint. Pet. App. 1a-26a. The court of appeals "assume[d] for purposes of [the] appeal that [respondent] retaliated against [petitioner] for complaining about perceived Title IX violations." *Id.* at 3a. The court held that the petitioner's suit must nonetheless be dismissed because Title IX does not prohibit retaliation or provide a right of action to redress it. *Id.* at 22a.

After describing the statute and applicable regulations, Pet. App. 3a-8a, the court of appeals began its analysis by stating that its decision was "governed in substantial measure by [this Court's] recent decision in *Alexander v. Sandoval*, [532 U.S. 275 (2001)]." *Id.* at 8a. At issue in *Sandoval* was whether a regulation prohibiting practices with a disparate impact on protected classes, promulgated under Title VI of the Civil Rights Act of 1964, gives rise to a private right of action for disparate impact violations. This Court concluded that, because Title VI itself does not prohibit practices with a disparate impact, no private right of action to challenge disparate impact discrimination exists. *See id.* at 10a-12a; *Sandoval*, 532 U.S. at 285-86.

After a lengthy discussion of *Sandoval* and the availability of a private claim for disparate impact under Title VI, Pet. App. 8a-17a, the court of appeals turned to the question presented here: whether claims for retaliation are cognizable under Title IX. Examining Title IX through the lens of *Sandoval*, the court could "find nothing in the language or structure of Title IX creating a private cause of action for retaliation." *Id.* at 19a. Observing that Section 901 of Title IX, 20 U.S.C. § 1681, does not in terms mention retaliation, the court concluded that the absence of an express reference to retaliation "weighs powerfully against a finding that Congress intended Title IX to reach retaliatory

conduct." *Id.* at 20a. As for Section 902, 20 U.S.C. § 1682, the court reasoned that it is "devoid of 'rights-creating' language of any kind" and therefore sheds no light on "what harm Title IX is meant to remedy." *Id.* at 21a. Moreover, the court stated, Section 902's provision of an administrative enforcement mechanism strongly counsels against inferring a private right of action against retaliation "because '[t]he express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others.'" *Id.* (quoting *Sandoval*, 532 U.S. at 290). The court also dismissed the relevance of the Department of Education regulation, reasoning that, because "Congress has not created a right through Title IX to redress harms resulting from retaliation, 34 C.F.R. §100.7(e) may not be read to create one either." *Id.* at 23a. The court thus concluded that Congress did not intend Title IX "to prevent or redress" retaliation and that petitioner therefore has no cause of action. *Id.* at 22a.

Although that conclusion was enough to dispose of the case, the court went on to state that, "even if Title IX did aim to prevent and remedy retaliation," its protection would not extend to those who, like petitioner, suffer reprisal because they complain about discrimination against others. Pet. App. 23a. The court reasoned that "there is quite simply *no* indication of any kind that Congress meant to extend Title IX's coverage to individuals other than direct victims of gender discrimination." *Id.* at 24a.

5. Petitioner sought panel rehearing and rehearing en banc, but the court of appeals denied his request. Pet. App. 34a-35a. Petitioner then sought this Court's review, and the Court granted his petition for a writ of certiorari. 124 S. Ct. 2834 (2004).

SUMMARY OF ARGUMENT

The broad ban on "discrimination" "on the basis of sex" in Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, encompasses a prohibition on retaliating against someone because that person has complained about sex discrimination. And this Court has long held that there is a private right of action to redress discrimination prohibited by Title IX. The court of appeals therefore erred in concluding that petitioner failed to state a valid claim for redress under Title IX.

The text of Title IX broadly prohibits sex-based "discrimination" regardless of the form that the discrimination takes. 20 U.S.C. § 1681. Discriminatory conduct is included in the statutory prohibition unless it falls within one of nine carefully delineated exceptions. Retaliation is simply one variant of discrimination – conduct that treats certain people differently and less favorably than others – and it is not excepted from Title IX's coverage. Further, retaliation is "on the basis of sex" when it is triggered by a complaint about sex-based discrimination. *Id.*

That interpretation of Title IX's text accords with the general rule that broad statutory bans on discrimination are construed to include prohibitions on retaliation. This Court established that principle in *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969), and the courts of appeals have applied it to a wide range of civil rights statutes. That same rule of construction should apply in reading Title IX.

Indeed, *Sullivan* was decided just three years before Congress passed Title IX, so Congress was aware that Title IX's broadly worded ban on discrimination would be understood, like the discrimination ban in *Sullivan*, to encompass a prohibition on retaliation. Moreover, Congress modeled Title IX on Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d *et seq.*, and that statute had consistently been interpreted, in regulations issued by the Department of

Health, Education, and Welfare before Title IX was enacted, to encompass a ban on retaliation.

Reading Title IX to prohibit retaliation is critical if the statute is to achieve its underlying purposes. Congress enacted Title IX both to eliminate federal funding of sex discrimination in educational programs and activities and to provide effective protection for those who might be victimized by that discrimination. Neither purpose can be effectively accomplished if the victims of discrimination and others are deterred from bringing discriminatory treatment to light because they are afraid of reprisal.

The authoritative agency regulations interpreting Title IX confirm that the statute prohibits retaliation for complaining about sex discrimination. If there were any ambiguity about the correct construction of Title IX, the Court would owe those regulations deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44 (1984). In fact, the interpretation of Title IX reflected in the regulations is entitled to special weight, even apart from ordinary *Chevron* deference, because Congress had a unique opportunity to review the regulations before they first took effect.

The court of appeals' contrary holding flows from a clear misunderstanding about the relevance to this case of the Court's decision in *Alexander v. Sandoval*, 532 U.S. 275 (2001). *Sandoval* held that there is no private right of action to enforce the prohibition on disparate impact discrimination created by regulations promulgated under Title VI because Title VI itself prohibits only intentional discrimination. That holding is inapposite here. The anti-retaliation regulations under Title IX do not provide protection beyond what the statute itself provides; rather, they interpret Title IX's core prohibition on discrimination. This case does not require the Court to recognize a new or expanded right of action under the regulations; instead, petitioner invokes only the right of

action to enforce Title IX's core protection that this Court recognized more than a quarter century ago in *Cannon*. The only question in this case is whether Title IX itself prohibits retaliation, and *Sandoval* does not speak to that question at all.

The court of appeals was also incorrect to suggest that retaliation victims like petitioner are not protected by Title IX when they have suffered reprisal for complaining about discrimination against others rather than against themselves. There is no basis in Title IX's text, implementing regulations, or purposes, nor any precedent, for the court of appeals' proposal that the statute's protection should be limited to "direct victims" of discrimination. In fact, there is no clear line between "direct" and "indirect" victims, and requiring courts to draw that distinction would unnecessarily distract them from Title IX's goal of providing effective protection for all victims of sex discrimination. Moreover, although the court of appeals assumed, without analysis, that petitioner is not a "direct victim," petitioner alleged and is entitled to the opportunity to prove that he was directly harmed by the discriminatory treatment about which he complained. Thus, the court of appeals' alternative holding – even if it were correct (which it is not) – would not justify the court's dismissal of petitioner's complaint.

ARGUMENT

TITLE IX PROVIDES REDRESS FOR THOSE WHO SUFFER RETALIATION BECAUSE THEY COMPLAIN ABOUT SEX DISCRIMINATION

This case is about the substantive scope of Title IX, not about whether to recognize a new or expanded private right of action under the statute. The central question in the case is whether Title IX's broad ban on "discrimination" on "the basis of sex," 20 U.S.C. § 1681(a), encompasses a prohibition on retaliation against someone for complaining about sex discrimination. Petitioner submits that it does and

that the private right of action that this Court recognized a quarter century ago in *Cannon* v. *University of Chicago*, 441 U.S. 677 (1979), accordingly includes redress for retaliation.

Cannon has already definitively established that there is a private right of action to enforce Title IX's ban on sex discrimination. 441 U.S. at 688-89; *see Alexander v. Sandoval*, 532 U.S. 275, 282 (2001). Therefore, if Title IX's anti-discrimination mandate includes a prohibition on retaliation, or if regulations implementing Title IX have reasonably construed it to include such a prohibition, then the private right of action recognized in *Cannon* provides redress for retaliation. *Sandoval*, 532 U.S. at 284.

Because this case, properly understood, is simply about the scope of a statutory right long recognized as redressible by a private cause of action, this Court's jurisprudence concerning when statutes may be construed to create such private rights of action – including the holding in *Sandoval* – is of little relevance. The court of appeals misunderstood that fundamental point, and that misunderstanding led the court to the erroneous conclusion that petitioner has no judicial remedy for the discrimination he suffered.

The court of appeals should have resolved this case by looking to the text, background, and purposes of Title IX, all of which indicate that the statutory ban on discrimination includes a prohibition on discrimination that takes the form of retaliation. That interpretation of the statute is confirmed by its implementing regulations, which have consistently and uniformly reflected the position that Title IX prohibits retaliation.

Indeed, it hard to imagine how Congress could have intended otherwise. Major anti-discrimination statutes, whether or not they expressly addresses retaliation, have been construed to prohibit retaliation. Those constructions reflect a widespread recognition that an anti-discrimination mandate cannot be effective unless those who invoke its

protections are safe from reprisal. This Court should therefore construe Title IX in accord with other anti-discrimination statutes and hold that its prohibition on sex discrimination includes a prohibition on retaliating against someone for complaining about sex discrimination.

I. TITLE IX PROHIBITS RETALIATION AGAINST THOSE WHO COMPLAIN ABOUT SEX DISCRIMINATION

A. The Text Of Title IX Prohibits "Discrimination" "On The Basis Of Sex," Including Discrimination That Takes The Form Of Retaliation

1. Title IX commands that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). That prohibition is phrased in sweeping language, and it is accordingly construed expansively. *See North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 521 (1982) (courts "must accord" Title IX "a sweep as broad as its language") (quoting *United States v. Price*, 383 U.S. 787, 801 (1966)).

Title IX broadly prohibits discrimination in which sex plays a role without regard to the form that the discrimination takes. The statute bans all such differential treatment – "exclu[sion] from participation," "deni[al]" of "benefits," and any other kind of "discrimination" – in or under "any" education program or activity receiving federal funding. 20 U.S.C. § 1681(a). Congress clearly understood the breadth of that anti-discrimination mandate, because it took care to specify with precision the conduct that it wanted to exclude from Title IX's coverage. The expansively phrased prohibition on discrimination is followed by a list of nine detailed exceptions. *See id.* (exempting, for example, certain categories of educational institutions; membership practices of certain fraternities, sororities, and youth service

organizations; and certain single sex scholarships for higher education). That structure indicates that Congress intended to prohibit *all* types of discrimination except for the particular forms of discrimination expressly excepted from Title IX's coverage. *See North Haven*, 456 U.S. at 521-22 (reasoning that employment discrimination is covered under Title IX because it is not among the listed exceptions).

Retaliation is simply one variant of discrimination – conduct that treats certain people differently and less favorably than others. *See Olmstead v. L.C., by Zimring*, 527 U.S. 581, 614 (1999) (stating that the "normal definition of discrimination" is "differential treatment of similarly situated groups"); *Newport News Shipbuilding and Dry Dock Co. v. E.E.O.C.*, 462 U.S. 669, 680 n.22 (1983) (defining discrimination as "less favorable" treatment). Singling someone out for reprisal because he or she has complained about discrimination is itself discrimination. *See, e.g.*, 38 U.S.C. § 516(d) (describing "retaliation" as a form of "discrimination"). Retaliation is therefore prohibited by Title IX, just as other forms of discrimination are prohibited when they are not excepted from the statute's coverage. Thus, just as employment discrimination and sexual harassment are encompassed within Title IX's prohibition, *North Haven*, 456 U.S. at 530; *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 75 (1992), so too is retaliation.

2. It has long been established by decisions of this Court and the courts of appeals that a broad statutory ban on discrimination like the one in Title IX encompasses a prohibition on retaliation. That approach to construing anti-discrimination statutes reflects the fact that retaliation bears "a symbiotic and inseparable relationship" to primary discrimination. *Peters v. Jenney*, 327 F.3d 307, 318 (4th Cir. 2003).

The landmark decision holding that a statutory prohibition on discrimination includes a prohibition against

retaliation is *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969), which was decided just three years before the enactment of Title IX. In *Sullivan*, the Court held that 42 U.S.C. § 1982, which prohibits discrimination in property transactions, also protects from retaliation those who complain about such discrimination.[2] Although Section 1982 makes no reference to retaliation, the Court concluded that it protected Sullivan, a white man expelled from membership in a community park because he protested the refusal to allow him to assign one of his membership shares to Freeman, a black man to whom he had rented a house. The Court explained that, if the expulsion "can be imposed, then Sullivan is punished for trying to vindicate the rights of minorities protected by § 1982. Such a sanction would give impetus to the perpetuation of racial restrictions on property." 396 U.S. at 237.

Consistent with *Sullivan*, the federal courts of appeals have routinely held that statutes that prohibit discrimination encompass a ban on retaliation even when they do not contain express anti-retaliation provisions. For example, the courts of appeals – including the court below – have concluded that 42 U.S.C. § 1981, which prohibits discrimination in contracting, provides redress for retaliation. *See, e.g.*, *Foley v. Univ. of Houston Sys.*, 355 F.3d 333, 339 (5th Cir. 2003); *Johnson v. Univ. of Cincinnati*, 215 F.3d 561, 576 (6th Cir. 2000); *Hawkins v. 1115 Legal Serv. Care*, 163 F.3d 684, 693 (2d Cir. 1998); *Andrews v. Lakeshore Rehab. Hosp.*, 140 F.3d 1405, 1412-13 (11th Cir. 1998);

[2] Section 1982 provides that "[a]ll citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." 42 U.S.C. § 1982.

Barge v. Anheuser-Busch, Inc., 87 F.3d 256, 259 (8th Cir. 1996).[3]

The same is true of the provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-16, and the Age Discrimination in Employment Act, 29 U.S.C. § 633a, which broadly prohibit "discrimination" in federal employment. Those provisions do not expressly address retaliation, but the courts of appeals have construed them to ban retaliation. *See, e.g., Forman v. Small*, 271 F.3d 285, 296-97 (D.C. Cir. 2001) (ADEA); *Ray v. Henderson*, 217 F.3d 1234, 1240 (9th Cir. 2000) (Title VII); *Brown v. Brody*, 199 F.3d 446, 452-53 (D.C. Cir. 1999) (Title VII); *Brower v. Runyon*, 178 F.3d 1002, 1005 (8th Cir. 1999) (Title VII); *Sweeney v. West*, 149 F.3d 550, 554 (7th Cir. 1998) (Title VII); *DeNovellis v. Shalala*, 135 F.3d 58, 63 n.2 (1st Cir. 1998) (implicitly recognizing ADEA claim); *Bornholt v. Brady*, 869 F.2d 57,

[3] Section 1981 provides, in relevant part, that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of the all laws and proceedings for the security of persons and property as is enjoyed by white citizens . . . ." 42 U.S.C. § 1981. Before this Court's decision in *Patterson v. McClean Credit Union*, 491 U.S. 164 (1989), the courts of appeals had uniformly held that Section 1981 broadly prohibits retaliation for complaining about discrimination in contracting. *See, e.g., Choudhury v. Polytechnic Inst. of N.Y.*, 735 F.2d 38, 42-44 (2d Cir. 1984); *Setser v. Novack Inv. Co.*, 638 F.2d 1137, 1146-47 (8th Cir.), *modified on other grounds*, 657 F.2d 962 (1981); *Winston v. Lear-Siegler, Inc.*, 558 F.2d 1266, 1268-70 (6th Cir. 1977). *Patterson*'s holding that Section 1981 did not address conduct after contract formation called into question the breadth of Section 1981's anti-retaliation protection, but courts continued to hold that at least some retaliation claims survived *Patterson*. *See Andrews*, 140 F.3d at 1410, 1412. Following enactment of the Civil Rights Act of 1991, Pub. L. No. 102-166, Title I, § 101, 105 Stat. 1071-72, the courts of appeals have once again uniformly held that Section 1981 encompasses a broad prohibition on retaliation, as illustrated by the cases cited in the text above.

62 (2d Cir. 1989) (stating in dictum that ADEA claim exists); *Canino v. EEOC*, 707 F.2d 468, 471-72 (11th Cir. 1983) (Title VII); *Porter v. Adams*, 639 F.2d 273, 277-78 (5th Cir. 1981) (Title VII).[4]

Similarly, before 1992, Section 504 of the Rehabilitation Act, 29 U.S.C. § 794, did not contain an express anti-retaliation provision, but courts had construed its anti-discrimination mandate to include a prohibition on retaliation. *See, e.g., Hoyt ex rel. Siebert v. St. Mary's Rehab. Ctr.*, 711 F.2d 864, 867 (8th Cir. 1983). As amended in 1992, Section 504 incorporates, for claims related to employment discrimination, the express anti-retaliation protection of the Americans with Disabilities Act. *See* 29 U.S.C. § 794(d) (incorporating 42 U.S.C. § 12203). But Section 504 still does not contain express protection from retaliation for other kinds of discrimination complaints. Nonetheless, courts have continued to construe its general anti-discrimination provision to provide that protection. *See, e.g., Weber v. Cranston Sch. Comm.*, 212 F.3d 41, 47-48 (1st Cir. 2000). Finally, in the specific context here, the Eleventh Circuit stands alone in its conclusion that Title IX's prohibition against sex discrimination does not encompass a prohibition against retaliation.[5]

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[4] The Tenth Circuit has assumed that the ADEA prohibits retaliation against federal employees and provides a cause of action to those who suffer retaliation, *see Lujan v. Walters*, 813 F.2d 1051, 1058 (10th Cir. 1987), but that court has also held that the federal government has not waived its sovereign immunity under the statute. *See Villescas v. Abraham*, 311 F.3d 1253, 1258 (10th Cir. 2002).

[5] *See Litman v. George Mason Univ.*, No. 01-2128, 2004 WL 345758, at **1, 92 Fed. Appx. 41, 42 (4th Cir. Feb. 25, 2004) (holding that Title IX authorizes a private right of action to seek damages for retaliation); *Frazier v. Fairhaven Sch. Comm.*, 276 F.3d 52, 67 (1st Cir. 2002) (establishing standard that must be met for student to prevail on Title IX retaliation claim); *Murray v. N.Y. Univ. Coll. of Dentistry*, 57 F.3d 243, 251 (2d Cir. 1995) (same); *Preston v. Virginia ex rel. New River Cmty. Coll.*, 31 F.3d 203, 206 (4th Cir. 1994) (stating that "[r]etaliation against an employee for filing a claim of gender discrimination is prohibited under Title IX"); *see also Brine v. Univ. of Iowa*, 90 F.3d 271, 272-73 (8th Cir. 1996) (implicitly recognizing that Title IX prohibits retaliation); *Willner v. Budig*, 848 F.2d 1032, 1033 (10th Cir. 1988) (same).

3. The language of Title IX comfortably accommodates the general rule that a broad ban on discrimination encompasses a ban on retaliation. As discussed above, Title IX prohibits all sex "discrimination" and does not anywhere suggest that retaliation is excluded from the discrimination covered by that prohibition. *See* pp. 12-13, *supra*. Moreover, when a recipient of federal funds retaliates against someone because that person has complained about sex discrimination, the recipient has discriminated against the person "on the basis of sex."

The requirement that retaliation be "on the basis of sex" does not mean that sex must be the sole or predominant cause of the retaliatory treatment. All it requires is that sex be a "basis" for the treatment, which means that sex must be a "supporting element" or an "underlying condition" or "circumstance." *See American Heritage Dictionary of the English Language* 150 (4th ed. 2000); *Webster's II New Riverside University Dictionary* 156 (1988); *Black's Law Dictionary* 161 (8th ed. 2004). Thus, sex must have played a role in the events leading to the retaliation or be a factor on which the retaliation rests. That is certainly the case when a recipient of federal funds retaliates against someone because that person has complained about sex discrimination. Sex is a "supporting element" and an "underlying condition" and "circumstance" of the retaliation in two respects: the retaliation was triggered by a complaint about *sex* discrimination, and differential treatment based on *sex* gave rise to that complaint.

4. If the Court were to reject that reading of Title IX and conclude that the statutory language does not encompass a prohibition on retaliation, the result would be widespread disruption of existing civil rights law. First, Title IX is generally construed *in pari materia* with Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d *et seq.*, which prohibits discrimination based on "race, color, or national origin" in all programs receiving federal funding. *See Cannon*, 441 U.S. at 695-96. Thus, a holding that Title IX does not prohibit retaliation could be interpreted to suggest that there is also no prohibition on retaliation against those who complain about racial or national origin discrimination in federally funded programs. Moreover, as discussed above, the rule of construction that a general ban on discrimination encompasses a ban on retaliation has been applied to a broad range of anti-discrimination statutes. A rejection of that principle as applied to Title IX would thus call into question the established law that other statutes – such as the Title VII and ADEA provisions prohibiting discrimination in federal employment and Section 504 of the Rehabilitation Act – prohibit retaliation.

The texts of those statutes, like the text of Title IX, broadly prohibit "discrimination" but do not explicitly refer to retaliation. For example, the federal employee provision of Title VII requires that federal employment decisions "be made free from any discrimination based on race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-16. Similarly, the ADEA provision governing federal employment requires that such decisions "be made free from any discrimination based on age." 29 U.S.C. § 633a. And Section 504 of the Rehabilitation Act declares, in language quite similar to Title IX, that "[n]o otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving

Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service." 29 U.S.C. § 794(a).

There is no reason for the Court to risk unsettling the established law that those statutes prohibit retaliation. For the reasons we have described above, those statutes and Title IX all can be read to encompass a prohibition on retaliation. And, in the case of Title IX, that reading of the text is confirmed by consideration of both the legal background against which Congress enacted the statute and the purposes Congress intended Title IX to achieve.

B. The Context Surrounding Title IX's Enactment Confirms That Congress Intended To Prohibit Retaliation

1. When Congress enacted Title IX, it was well aware that sex discrimination in educational programs frequently takes the form of retaliation. Indeed, Congress had heard extensive testimony to that effect in the hearings that preceded Title IX's enactment.

Witnesses testified about the reprisals that students and faculty suffered when they complained about sex discrimination and about how fear of retaliation deterred discrimination victims and others who observed discrimination from complaining. *See Discrimination Against Women: Hearings Before the Special Subcomm. on Educ. of the House Comm. on Educ. & Labor*, 91st Cong. 242 (1970) (*1970 Hearings*) (testimony of Dr. Ann Harris) ("[W]omen who have criticized their faculties for sexual discrimination have been 'censured for conduct unbecoming,' a rare procedure in academe normally reserved for actions such as outright plagiarism."); *id.* at 302 (statement of Bernice Sandler) ("[I]t is also very dangerous for women students or women faculty to openly complain of sex discrimination on their campus. . . . At a recent meeting of professional women I counted at least four women whose

contracts were not renewed after it became known that they were active in fighting sex discrimination at their respective institutions."); *id.* at 463 (testimony of Daisy Fields) ("[F]ew women have dared to file complaints of sex discrimination" because "[w]e know of a number" of cases in which "women who have filed complaints have suffered reprisals in the form of having their jobs abolished" or "have been reassigned to some degrading position far below their capabilities in anticipation they might resign."); *id.* at 588 (statement of Women's Rights Comm'n of New York Univ. Sch. of Law) ("It was recently discovered that one woman had tried to get [the dormitory] opened up ten years ago, when the whole building . . . was closed to women. She raised a complaint at a faculty meeting about this situation; blackballing letters written by faculty members were subsequently placed in her employment file at the law school without her knowledge.").

Congress also had before it documents describing retaliatory discrimination faced by those who complained about sex discrimination. *1970 Hearings* at 1051 (reprinting *Samuel Stafford, Women on the March Again – Are They Being Discriminated Against in White-Collar Federal Jobs*, Gov't Executive, June 1969) ("A few [women] fight back – and pay the penalty for bucking the male dominated system."); 118 Cong. Rec. 5812 (1972) ("[O]n some campuses it is still dangerous to fight sex discrimination. I know of numerous women whose jobs were terminated, whose contracts were not renewed, and some who were openly and directly fired for fighting such discrimination.").

2. Congress was not only aware that retaliatory discrimination was a problem but also understood that it would make such retaliation unlawful by enacting Title IX's general prohibition on discrimination based on sex. As this Court noted in *Cannon*, Congress enacted Title IX against the backdrop of the "recently issued" decision in *Sullivan*. 441 U.S. at 698 n.22. "[I]t is not only appropriate but also

realistic to presume that Congress was thoroughly familiar with" that "unusually important precedent[] . . . and that it expected its enactment to be interpreted in conformity with [it]." *Id.* at 699. Thus, Congress presumably intended the broad prohibition on discrimination in Title IX to encompass a prohibition on retaliation, just as this Court in *Sullivan* had read the broad prohibition on discrimination in Section 1982 to encompass such a prohibition.

Moreover, as this Court has repeatedly recognized, Congress modeled Title IX on Title VI of the Civil Rights Act of 1964. *See, e.g., Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 286 (1998); *Cannon*, 441 U.S. at 694. Consequently, "[t]he drafters of Title IX explicitly assumed that it would be interpreted and applied as Title VI had been during the preceding eight years." *Cannon*, 441 U.S. at 696. During those eight years, HEW had consistently construed the anti-discrimination mandate of Title VI to include a prohibition on retaliation. That interpretation was reflected in the implementing regulations that HEW first promulgated in 1964 and that remained in place when Congress enacted Title IX. *See* 29 Fed. Reg. 16,298, 16,301 (1964) (promulgating 45 C.F.R. § 80.7(e) ("Intimidatory or retaliatory acts prohibited")); 45 C.F.R. § 80.7(e) (1971).

HEW had applied the regulation's interpretation of Title VI in the high profile context of school desegregation. In 1966, HEW had issued guidelines stating that Title VI required school districts to refrain from retaliating against, and to protect from retaliation, black students who exercised their rights to attend previously all-white schools under recently established "freedom of choice" plans. *See* 31 Fed. Reg. 5623, 5624, 5626, 5628 (1966) (45 C.F.R. §§ 181.17(c) and 181.52). School districts were required to issue public notices stating, in language that closely paralleled the anti-retaliation regulation, that it was unlawful to "intimidate, threaten, coerce, retaliate or discriminate against any

individual for the purpose of interfering with the free making of a choice of school." *See id.* at 5633 (Attachment 5 ¶17).

The United States Court of Appeals for Fifth Circuit, in a prominent en banc decision, had upheld the HEW guidelines as complying "with the letter and spirit of the Civil Rights Act of 1964." *See United States v. Jefferson County Bd. of Educ.*, 380 F.2d 385, 390 (5th Cir. 1967) (en banc). And the court of appeals had incorporated the guidelines, including the anti-retaliation provisions, into a model decree that covered all school districts in the circuit. *Id.* at 392. Thus, the legal context in which Title IX was enacted makes clear that Congress intended the statute, like Title VI of the Civil Rights Act, to prohibit retaliation.

C. Reading Title IX To Prohibit Retaliation Is Critical To Achieving The Statute's Purposes

It is even clearer that Congress intended Title IX to prohibit retaliation when one considers the purposes that Congress was trying to achieve in enacting the statute. Congress "sought to accomplish two related, but nevertheless somewhat different, objectives. First, Congress wanted to avoid the use of federal resources to support discriminatory practices; second, it wanted to provide individual citizens effective protection against those practices." *Cannon*, 441 U.S. at 704. Title IX could not achieve either of those objectives if recipients of federal funds felt free to retaliate against those who complain about sex discrimination.

1. Individuals cannot enjoy meaningful protection against sex discrimination unless there is an effective mechanism to enforce a legal prohibition on discrimination. And an enforcement regime cannot be effective unless victims and others who observe discrimination are willing to assert the right to be free from discriminatory treatment. But those individuals will not be willing to assert that right if they have no effective remedy against reprisal.

Without effective protection against retaliation, a discrimination victim could never fully vindicate his or her rights. Even if the victim protested and ultimately obtained judicial redress for an initial act of discrimination, that redress would be of little value because the same discriminatory treatment (or worse) could be imposed as reprisal for the initial complaint. After one or two victims complained and suffered retaliation, future victims – and others who observed discrimination – would be unlikely to complain for fear of ending up in a worse position than if they had remained silent.

This Court invoked similar concerns in *Sullivan* in explaining why Section 1982 protects from retaliation those who "try[] to vindicate the rights of minorities" under that statute. *See Sullivan*, 396 U.S. at 237 (explaining that, if retaliation were lawful, that would "give impetus to the perpetuation of" the primary discrimination prohibited by Section 1982). The concerns that animated the Court in *Sullivan* apply with equal force here. *See* United States Department of Justice, *Title IX Legal Manual* (*DOJ Title IX Manual*) 70 (Jan. 11, 2001) <http://www.usdoj.gov/crt/cor/coord/ixlegal.pdf> (interpretive manual for federal agencies) (reasoning that, without retaliation protection, the underlying prohibition on sex discrimination could not be effective).

2. Protection against retaliation is also critical to achieving Congress's goal of avoiding the use of federal resources to support discriminatory practices. That goal too depends on the willingness of those who suffer or observe discrimination to report it. If discrimination remains hidden, then the federal government will continue to subsidize the discrimination, unaware that it is doing so.

Research shows that retaliation remains an obstacle to rooting out discrimination even with the existing prohibitions against it. *See* Floyd D. Weatherspoon, *Don't Kill the Messenger: Reprisal Discrimination in the Enforcement of*

Civil Rights Laws, 2000 L. Rev. M.S.U.-D.C.L. 367, 369, 383 & n.88, 394 n.155 (discussing reprisal against employees who have responsibility for ensuring equal employment opportunity); Louise F. Fitzgerald, *et al.*, *Why Didn't She Just Report Him? The Psychological and Legal Implications of Women's Responses to Sexual Harassment*, 51 J. Soc. Issues 117, 122 (1995) ("The most common reason [women do not report workplace harassment] . . . is fear – fear of retaliation. . . . Unfortunately, such beliefs are often well-founded."); Edward A. Marshall, *Excluding Participation in Internal Complaint Mechanisms From Absolute Retaliation Protection: Why Everyone, Including the Employer, Loses*, 5 Employee Rts. & Employment Pl'y J. 549, 586-87 (2001) (noting that only between 12 and 20 percent of harassed employees ever report the misconduct and that "studies demonstrate that nearly 70 percent of female employees questioned about their failure to report sexual harassment in the workplace considered the potential for retaliation to be a moderate or strong influence on their decision"). The problem would be far more serious if there were no prohibition on retaliation.

Moreover, protection from retaliation is particularly important in the context of the educational programs and activities covered by Title IX (and its sister statute Title VI). Resolving discrimination complaints through internal conciliation and voluntary compliance is desirable in the educational setting. Those resolution mechanisms can minimize disruption of the educational process. They also can increase the likelihood that problems will be corrected promptly so that students can benefit from the corrective measures before they move on to other schools or graduate.

Internal conciliation and voluntary compliance are impossible, however, without strong protection against retaliation. There can be no voluntary resolution of discrimination complaints unless victims of discrimination

and others who observe it are willing to bring it to the attention of personnel who can investigate and take corrective action. But neither discrimination victims nor others will risk alerting those in authority to discriminatory treatment unless they are secure that they are protected against reprisal. Thus, absent vibrant retaliation protection, the result will be less conciliation and voluntary compliance and more litigation, a result that is certainly counterproductive.

The problems inherent in a failure to protect against retaliation are underscored in the case of those who suffer sexual harassment. In that context, the Court has held that a victim of harassment cannot bring a suit to recover damages unless an official of the recipient entity with authority to take corrective action had actual notice of the harassment and failed to take corrective action. *See Gebser*, 524 U.S. at 290. It would make no sense to require the victim of harassment to alert an official in authority if that official was then free ~~to~~ retaliate against the victim for seeking corrective action.

3. Not only is protection against retaliation vital to the integrity of Title IX's core prohibition on sex discrimination, but the costs of prohibiting retaliation are minimal. A recipient of federal assistance has no legitimate interest in retaliating against those who complain about unlawful discrimination. Moreover, retaliation is, by its very nature, an intentional and official act of the recipient entity that can only be carried out by someone acting with authority. It is thus entirely appropriate to hold the recipient accountable for the retaliation.[6]

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[6] Because retaliation is itself an intentional act, the Fourth Circuit was incorrect in *Peters*, 327 F.3d at 319, when it stated that an individual can assert a retaliation claim under Title VI (and thus presumably under Title IX as well) only if the complaint triggering the retaliation is also about intentional discrimination. On the contrary, as the Fourth Circuit recognized elsewhere in its opinion, *see id.* at 320-21, all that is

Furthermore, experience shows that retaliation claims under Title IX have not posed an undue burden on either the administrative resolution process or the federal court system. The Office for Civil Rights of the Department of Education has received an average of fewer than 85 such complaints each year for the last ten years. *See* Letter from Alice B. Wender, Director, District of Columbia Office for Civil Rights, United States Department of Education, to Nicole Birch, O'Melveny & Myers, LLP (July 1, 2004) (reprinted in Appendix to Brief of Amicus Curiae New York Lawyers for the Public Interest *et al.* Supporting Petitioner). And most of those complaints have not ended up in court. In the more than 30 years since Title IX was enacted, there have been only about 125 reported cases in which the plaintiffs raised retaliation claims.[7]

D. Title IX's Implementing Regulations, Which Interpret The Statute To Prohibit Retaliation, Are Entitled To Deference

For the reasons set out above, Title IX's text, considered along with the well-established anti-discrimination case law, the legal background against which Title IX was enacted, and Congress's purposes in enacting it all make clear that Title IX prohibits retaliation. If there remained any

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necessary is that the complainant have acted "in good faith and *with a reasonable and sincere belief that he or she is opposing unlawful discrimination.*" *Talanda v. KFC Nat'l Mgmt.*, 140 F.3d 1090, 1096 (7th Cir. 1998) (quoting *Roth v. Lutheran Gen. Hosp.*, 57 F.3d 1446, 1459 (7th Cir. 1995)) (retaliation standard under Title VII and ADA). That remains true whether the discrimination is made unlawful by the statute itself or by federal regulations effectuating the statute. The Court need not address that question here, however, because petitioner complained about intentional discrimination – respondent's provision of unequal funding and facilities to the girls' basketball team.

[7] A search of all state and federal cases contained in the Westlaw database for the terms "Title IX" & "retaliat!" yielded fewer than 125 cases in which some sort of retaliation claim was brought under Title IX.

ambiguity at all about whether the "discrimination" prohibited by Title IX includes retaliation, that ambiguity would be resolved by the regulations that federal agencies providing educational funding have adopted to implement the statute. Those implementing regulations uniformly interpret Title IX to prohibit retaliation. That interpretation is entitled to deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44 (1984). Indeed, the Title IX regulations should be given especially great weight because they were submitted for congressional review, and Congress allowed them to take effect without modification.

1. Each federal agency that disburses federal financial assistance is charged with enforcing Title IX for its recipients, and each agency has express authority to promulgate regulations to effectuate Title IX's ban on discrimination. 20 U.S.C. § 1682. As a historical matter, however, HEW and its successor agency, the Department of Education, have been the primary enforcers of Title IX.

HEW first promulgated regulations implementing Title IX in 1975, shortly after the statute was enacted. Those regulations adopted by cross-reference an existing Title VI regulation that interpreted the statutory ban on discrimination to bar retaliation. *See* 40 Fed. Reg. 24,128, 24,136, 24,144 (1975) (promulgating 45 C.F.R. § 86.71 (1975), which incorporated by reference 45 C.F.R. § 80.7(e) (1975)). The current regulations are substantively identical to the initial regulations. *See* 34 C.F.R. § 106.71 (incorporating 34 C.F.R. § 100.7(e)). The regulation addressing retaliation is entitled "Intimidating or retaliatory acts prohibited." It provides that "[n]o recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by [20 U.S.C. § 1681] or this part, or because he has made a complaint, testified, assisted, or participated in any manner

in an investigation, proceeding or hearing under this part." 34 C.F.R. § 100.7(e). That regulation reflects the Department of Education's view that "retaliation is prohibited by Title IX." 62 Fed. Reg. 12,034, 12,044 (1997).

In addition, since 1980, the Department of Justice (DOJ) has been charged by Executive Order with responsibility to "coordinate the implementation and enforcement by Executive agencies" of Title IX. 45 Fed. Reg. at 72,995. In the exercise of that responsibility, DOJ has adopted the same retaliation regulation as the Department of Education, and it has coordinated the promulgation of substantively identical regulations by 20 other federal agencies. *See* 65 Fed. Reg. at 52,858. Those common regulations reflect the view that retaliation is one of the "general types of prohibited discrimination" under Title IX. *DOJ Title IX Manual, supra,* at 57.[8]

The regulations reflect the uniform view of the federal agencies authorized to promulgate regulations effectuating Title IX. Moreover, the regulations were adopted under an express grant of rulemaking authority after public notice and comment. They are therefore entitled to *Chevron* deference. *See United States v. Mead Corp.*, 533 U.S. 218, 229-30 (2001). Because the regulations are a reasonable reading of Title IX for all the reasons we have described above, *see* pp.

[8] Several other agencies have independently adopted Title IX regulations. Those regulations all contain provisions identical to the anti-retaliation provision promulgated by the Departments of Education and Justice. *See* 7 C.F.R. § 15a.71 (regulation promulgated by the Department of Agriculture, incorporating by reference 7 C.F.R. § 15.7); 10 C.F.R. § 5.605 (regulation promulgated by the Department of Energy, incorporating by reference 10 C.F.R. § 4.45); 45 C.F.R. § 86.71 (regulation promulgated by the Department of Health & Human Services and adopted by the National Endowment for the Arts and the National Endowment for the Humanities, incorporating by reference 45 C.F.R. § 80.7(e)).

12-26, *supra*, they are entitled to controlling weight. *See Mead*, 533 U.S. at 229 (citing *Chevron*).

Indeed, this Court, recognizing the Department of Education's historical role as the agency primarily responsible for administering Title IX, has previously deferred to the Department's reading of the statute. *See Cannon*, 441 U.S. at 706, 708 & n.42; *cf. North Haven*, 456 U.S. at 522 n.12 (declining to defer to a particular interpretation of Title IX because the interpretation was in flux); *see also* 65 Fed. Reg. at 52,859 (noting that the Department of Education regulations were used as model for the common regulations because of the Department's role as the lead agency in Title IX enforcement). DOJ's view is also entitled to great weight because of its responsibility for coordinating government-wide enforcement of Title IX. *See Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 195 (2002); *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624, 634 (1984); *Andrus v. Sierra Club*, 442 U.S. 347, 357-58 (1979).

2. The interpretation of Title IX reflected in the regulations is entitled to special weight, even apart from ordinary *Chevron* deference, because Congress had a unique opportunity to review and approve the regulations. Section 431(d)(1) of the General Education Provisions Act required HEW to submit the regulations to Congress before they took effect. *See* Education Amendments of 1974, Pub. L. No. 93-380, 88 Stat. 567 (formerly codified at 20 U.S.C. § 1232(d)(1) (Supp. IV 1974)). Congress had 45 days to review the regulations and could disapprove them by a concurrent resolution if it found them "inconsistent with the Act." *Id.*

Congress diligently reviewed the Title IX regulations, including the anti-retaliation provision, to ensure that the regulations were consistent with the statute. The Subcommittee on Postsecondary Education of the House

Committee on Education and Labor held six days of hearings to evaluate the regulations. Representative O'Hara, the Chair of the House Subcommittee conducting the hearings, stated the Subcommittee's charge as follows:

> The regulations will be reviewed solely to see if they are *consistent with the law and with the intent of the Congress* in enacting the law. We are not meeting to decide whether or not there should be a Title IX but solely to see if the regulation writers have read Title IX and understood it the way the lawmakers intended it to be read and understood.

Sex Discrimination Regulations: Hearing Before the Subcomm. on Postsecondary Educ. of the House Comm. on Educ. and Labor, 94th Cong. 1 (1975) (emphasis added). The House Subcommittee on Equal Opportunities likewise held a hearing to determine whether the regulations accorded with Congress's intent in enacting Title IX. *Hearing on House Concurrent Resolution 330 (Title IX Regulation) Before the Subcomm. on Equal Opportunities of the House Comm. on Educ. and* Labor, 94th Cong. (1975).

Members of Congress introduced no fewer than six resolutions that would have disapproved the Title IX regulations, but Congress passed none of the proposed resolutions. *North Haven*, 456 U.S. at 533-34 n.24. By deciding not to block implementation of the regulations, Congress confirmed that they were, in the words of the House Subcommittee Chair, "consistent with the law and with the intent of Congress." *Sex Discrimination Regulations*, *supra*. Thus, as this Court has previously recognized, the regulations – including the anti-retaliation regulation – took effect with implicit congressional approval. *North Haven*, 456 U.S. at 533-34.

Furthermore, after the regulations took effect, Congress revisited Title IX several times, making significant substantive amendments in 1976 and 1988. *See* Education

Amendment of 1976, Pub. L. No. 94-482, Title IV, § 412(a), 90 Stat. 2234; Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, § 3(a), 102 Stat. 28. In neither of those amendments did Congress express any disapproval of the agency's reading of the statute to prohibit retaliation.

Although post-enactment developments of this sort are not dispositive, this Court has recognized, in discussing the Title IX regulations themselves, that "[w]here 'an agency's statutory construction has been "fully brought to the attention of the public and the Congress," and the latter has not sought to alter that interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned.'" *North Haven*, 456 U.S. at 535 (quoting *United States v. Rutherford*, 442 U.S. 544, 554 n.10 (1979) (quoting *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 489 (1940))). The legislative intent has been correctly discerned here. As reflected in the longstanding regulations that Congress has consistently declined to overturn, Title IX prohibits retaliation against those who complain about sex discrimination.[9]

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[9] The Solicitor General agrees with petitioner that Title IX prohibits retaliation but takes a somewhat narrower view than petitioner of the scope of the prohibition. The Solicitor General argues that someone who suffers retaliation for complaining about sex discrimination would not have redress if the employer retaliated not only against that person but also against all complainers. Br. for the United States as Amicus Curiae at 6. This case does not require the Court to choose between petitioner's and the government's views of the precise contours of the retaliation protection, because the court of appeals held that the statute provides *no retaliation protection of any kind*. Moreover, petitioner's allegation that he "was subjected to adverse terms of employment *because of* gender discrimination" (J.A. 11 (emphasis added)) states a claim even under the government's view. Thus, reversal of the court of appeals is required under both petitioner's and the government's positions.

If the Court nonetheless chooses to address the issue, it should reject the narrow reading of the retaliation protection proposed by the Solicitor

E. The Contrary Arguments On Which The Court Of Appeals Relied Are Unpersuasive

1. The primary reason offered by the court of appeals for concluding that Title IX does not prohibit retaliation was that such a conclusion is dictated by this Court's decision in *Alexander v. Sandoval*, 532 U.S. 275 (2001). *See, e.g.*, Pet. App. 8a (stating that "[o]ur analysis of [petitioner's] claim is governed in substantial measure by" *Sandoval*); *id.* at 9a ("*Sandoval*'s interpretation of Title VI powerfully informs our reading of Title IX"); *id.* at 10a-17a (describing *Sandoval* in detail); *id.* at 17a (calling *Sandoval* a "template" for the court's analysis). But *Sandoval* – a case about whether private parties may invoke Title VI to obtain redress for disparate impact discrimination – has no bearing on the central question in this case – whether Title IX prohibits retaliation.

In *Sandoval*, the Court held that Title VI regulations that prohibit discriminatory effects cannot be privately enforced. The Court reasoned that, because Title VI itself prohibits only intentional discrimination, it is "clear that the private right of action to enforce [Title VI] does not include a private right to enforce [disparate impact] regulations." 532 U.S. at 285. *Sandoval* thus holds that there can be no implied cause

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General. That reading would be a sharp break from existing civil rights law. We are not aware of any reported decision holding that a victim of retaliation was not protected because the retaliator targeted all those who complained rather than only those who complained about the particular discrimination suffered by the victim. Moreover, limiting the retaliation protection in that way would seriously compromise its effectiveness: victims of discrimination will be deterred from complaining if a discriminator retaliates against them – whether or not the discriminator also retaliates against other complainers. The new limit on retaliation proposed by the government is thus at odds with the very reason retaliation is prohibited in the first place. *See generally* Brief of Amicus Curiae New York Lawyers for the Public Interest *et al.* Supporting Petitioner (discussing this issue in detail).

of action for conduct that is permissible under a statute, even when such a right might be implied by agency regulation. *See id.* at 290-91.

Sandoval's holding is inapposite here because petitioner does not rely on federal regulations that have extended Title IX's protection beyond the protection provided by the statute. Rather, petitioner invokes only the core protection provided by Title IX itself and relies on the right of action to enforce that protection that this Court recognized more than a quarter century ago in *Cannon*. The disputed issue in this case is whether Title IX itself prohibits retaliation. And *Sandoval* does not speak to that question. Instead, that question is resolved, as discussed above, by looking to the text, purposes, and background of Title IX, all of which show that Title IX's prohibition on discrimination on the basis of sex encompasses a ban on retaliation.

It is true that, as described above, federal agency regulations provide that Title IX prohibits discrimination. *See* pp. 27-28, *supra*. But Title IX would prohibit retaliation even if those regulations did not exist. The Title IX anti-retaliation regulations, unlike the regulations at issue in *Sandoval*, do not extend the protection of Title IX beyond its terms. Rather, as the Solicitor General explained in his amicus brief in support of the petition for a writ of certiorari, the regulations reflect an "interpretation of the terms of Title IX itself." Br. for the United States as Amicus Curiae at 11. *Sandoval* in no way suggests that the existence of regulations of that sort precludes application of a private right of action. On the contrary, *Sandoval* confirms that regulations like the ones here, which "authoritatively construe the statute itself," may be privately enforced. 532 U.S. at 284 (citation omitted). That is because, when Congress "intends a statute to be enforced through a private cause of action it intends the

authoritative interpretation of that statute to be so enforced as well." *Id.*[10]

2. In addition to relying on *Sandoval*, the court of appeals relied on a purported negative implication of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq*. The court reasoned that Title VII expressly prohibits retaliation by private employers, so the absence of a similar provision in Title IX "may indicate" that Title IX does not cover retaliation. Pet. App. 20a n.12. That reasoning is incorrect.

The court of appeals' reasoning ignores a crucial difference between the language and structures of Title IX and Title VII. In contrast to the broadly worded prohibition on discrimination in Title IX, Title VII spells out in detail the specific forms of conduct that violate the statute. *Compare* 20 U.S.C. § 1681 *with* 42 U.S.C. §§ 2000e-2, 2000e-3.[11]

[10] The degree to which the court of appeals went off track because of its reliance on *Sandoval* is illustrated by the court's reasoning that, under *Sandoval*, the administrative remedies provided by 20 U.S.C. § 1682 "strongly counsel[] against inferring a private right of action against retaliation." *See* Pet. App. 21a. This Court in *Cannon* already considered the import of those administrative remedies for the existence of a right of action to enforce Title IX's prohibition on discrimination. The Court concluded that the existence of a right of action is fully consistent with the administrative remedies. *See Cannon*, 441 U.S. at 693-94. There was no reason for the court of appeals to revisit that conclusion in this case, because petitioner seeks to rely only on the cause of action that this Court recognized in *Cannon*. This case does not require the expansion of that cause of action nor recognition of a new one based on other provisions of Title IX or the implementing regulations.

[11] For example, in addition to addressing retaliation (42 U.S.C. § 2000e-3(a)), Title VII also specifically addresses the illegality of discrimination in hiring and discharge (42 U.S.C. § 2000e-2(a)(1)); discrimination in compensation, terms, conditions, or privileges of employment (42 U.S.C. § 2000e-2(a)(1)); discrimination effected by limiting, segregating, or classifying employees or applicants for employment in different ways (42 U.S.C. § 2000e-2(a)(2)); discrimination by employment agencies (42 U.S.C. § 2000e-2(b)); discrimination by labor organizations (42 U.S.C. § 2000e-2(c)); discrimination in training programs (42 U.S.C. § 2000e-2(d)); and discriminatory use of test scores (42 U.S.C. § 2000e-2(l)).

Because Congress did not mention any specific discriminatory practices in delineating Title IX's prohibition on discrimination, the failure to mention one particular practice, such as retaliation, says nothing about whether that practice is permissible.

The court of appeals' reasoning also ignores that Title VII itself has been construed to prohibit retaliation even where it does not expressly do so. As noted above, when Title VII was amended to reach federal employees in 1972, Congress did not specifically incorporate the anti-retaliation provision into that new section. *See* 42 U.S.C. § 2000e-16. Despite the absence of any language in Section 2000e-16 addressing retaliation, the courts of appeals have uniformly held that its general prohibition on discrimination protects federal workers against retaliation. *See* pp. 15-16, *supra* (citing cases).

The court of appeals' reasoning also cannot be reconciled with the established principle that a broad ban on "discrimination" includes a ban on retaliation. As described above, that principle has been uniformly applied across the range of anti-discrimination statutes, and it is particularly applicable to Title IX because Title IX was enacted soon after *Sullivan*, the landmark decision of this Court applying the principle. *See* pp. 13-16, *supra*. Thus, whatever Congress may have believed about whether a ban on discrimination would include a ban on retaliation when it enacted Title VII in 1964, Congress knew that a broad discrimination prohibition would include a retaliation prohibition when it enacted Title IX in 1972 in the wake of the *Sullivan* decision. The court of appeals erred in holding to the contrary.

II. TITLE IX'S PROHIBITION ON RETALIATION INCLUDES PROTECTION FOR THOSE WHO COMPLAIN ABOUT SEX DISCRIMINATION AGAINST OTHERS

The court of appeals also rested its dismissal of petitioner's complaint on the alternative holding that, even if Title IX protects against retaliation, that protection does not extend to those who are not themselves "direct victims" of sex discrimination. Pet. App. 23a. The court's proposed distinction between "direct victims" and "those who care for, instruct, or are affiliated with them" (*id.*) is untenable. Once one acknowledges that Title IX protects against retaliation, there is no basis in the statute's text, implementing regulations, or purposes, nor any precedent, for limiting its protection to those who have complained about discrimination against themselves rather than others.

Moreover, as this case illustrates, there is no clear line between so-called "direct" and "indirect" victims. Contrary to the court of appeals' assumption that petitioner is not a "direct victim," petitioner alleged and must, at this stage of the case, be presumed to be able to prove that he was directly harmed by the discrimination about which he complained. Thus, the court of appeals' alternative holding – even if it were correct (which it is not) – would not justify dismissal of petitioner's complaint. Instead, it would raise a host of new and difficult questions about who does and does not qualify as a "direct" victim entitled to the full protection of Title IX's ban on retaliation.

A. Title IX's Text And Implementing Regulations Prohibit Retaliation Against Individuals Who Complain About Discrimination Against Others

1. There is no textual basis to confine Title IX's prohibition against retaliation to so-called "direct victims" of discrimination. The prohibition on retaliation flows from the statute's prohibition against "discrimination" "on the basis of

sex." 20 U.S.C. § 1681(a). And retaliation for filing a complaint about sex discrimination is just as much "discrimination" "on the basis of sex" when the complaint concerns discrimination against others as when the complaint concerns discrimination against oneself.

There might be some textual basis for limiting the retaliation protection to those who protest discrimination directed against themselves if Title IX provided that no person shall be subject to discrimination "on the basis of *such individual's* sex." In that instance, one could argue that retaliation can only be described as discrimination on the basis of the complainant's sex if the complaint that triggers the retaliation concerns sex-based discrimination against the complainant herself. But Title IX does not contain any such limiting phrasing. The absence of that language from Title IX is particularly notable because Congress included language of that kind in other anti-discrimination statutes. *See, e.g.*, 42 U.S.C. § 2000e-2(a) ("It shall be an unlawful employment practice for an employer . . . to discriminate against any individual . . . because of *such individual's* race, color, religion, sex, or national origin . . . ." (emphasis added); 29 U.S.C. § 623(a) ("It shall be unlawful for an employer – (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual . . . because of *such individual's* age . . . .") (emphasis added).

2. There is also no basis in the language of the regulations implementing Title IX for drawing a distinction between those who complain about discrimination against themselves and those who protest discrimination against others. A recipient of federal assistance violates the Department of Education's regulation if the recipient retaliates against "*any* individual for the purpose of interfering with *any* right or privilege secured by [20 U.S.C. § 1681] of the Act or this part, or because he has made a

complaint, testified, assisted, or participated *in any manner* in an investigation, proceeding or hearing under this part." 34 C.F.R. § 106.71 (as incorporated by 34 C.F.R. § 100.7(e) (emphasis added)).

The regulation does not contain any requirement that the right or privilege to be interfered with must belong to the person who suffers the prohibited retaliation. Nor is there a requirement that the complaint or other participation involve discrimination against the complainant or participating individual. On the contrary, the repeated use of the adjective "any" makes absolutely clear that the protection against retaliation extends to those who advocate the rights of others. And that is how the government interprets the regulation and the statute itself. *See DOJ Title IX Manual, supra,* at 71-72; Br. for the United States as Amicus Curiae at 11-12.

B. Precedent Supports Protecting Those Who Complain About Discrimination Against Others

There is also no basis in precedent for limiting Title IX's retaliation protection to "direct victims" of discrimination. We are not aware of any reported Title IX retaliation case (apart from the decision below) that turns on whether the claimant had protested discrimination against him or herself rather than discrimination against others.

Consistent with the precedent concerning Title IX, none of the major civil rights statutes that expressly bar retaliation limits its protection to those who protest discrimination against themselves. On the contrary, those statutes consistently protect all those who complain even if they complain solely about discrimination against others.

For example, the anti-retaliation provision of Title VII provides that "[i]t shall be an unlawful employment practice for an employer . . . . to discriminate against *any* individual . . . . because he has opposed *any* practice made an unlawful employment practice by this subchapter, or because

he has made a charge, testified, assisted, or participated *in any manner* in an investigation, proceeding, or hearing under this subchapter." 42 U.S.C. § 2000e-3 (emphasis added). Other civil rights statutes with anti-retaliation provisions likewise cover those who complain about discrimination against others. *See* 42 U.S.C. § 12203(a) & (b) (2000) (Americans with Disabilities Act); 29 U.S.C. § 623(d) (Age Discrimination in Employment Act); 29 U.S.C. § 2615(a) (Family and Medical Leave Act).

Furthermore, apart from the court of appeals in this case, the courts of appeals have not drawn a distinction between "direct" and "indirect" victims when construing the retaliation protection provided by anti-discrimination statutes that do not have express anti-retaliation provisions. *See, e.g., Peters*, 327 F.3d at 318 (Title VI); *Johnson*, 215 F.3d at 576 (Section 1981); *Skinner v. Total Petroleum, Inc.*, 859 F.2d 1439, 1447 (10th Cir. 1988) (same); *Winston v. Lear-Siegler, Inc.*, 558 F.2d 1266, 1268-70 (6th Cir. 1977) (same).

Even more importantly, drawing such a distinction conflicts with *Sullivan*. As discussed above, the white victim in *Sullivan* was expelled from membership in his community park for complaining about discrimination against his black lessee. The Court held that he could maintain an action under Section 1982 because he had suffered retaliation "for the advocacy of [the lessee's] cause." 396 U.S. at 237. The Court explained that, if such retaliation were lawful, it "would give impetus to the perpetuation of racial restrictions on property." *Id.* The Court made no suggestion that Section 1982 requires that the person suing for retaliation have suffered or protested an independent violation of his own rights. And there is no reason to believe that Congress intended to impose such a requirement under Title IX.

C. Protection For Those Who Protest Discrimination Against Others Is Necessary To Further The Purposes Of Title IX

As the Court's analysis in *Sullivan* indicates, there is no reason to limit protection against retaliation to those who complain about personal discrimination rather than discrimination against others; rather, there is good reason not to do so. At times, "the only effective adversary" of discrimination is someone who is not its direct target. *Sullivan*, 396 U.S. at 237 (quoting *Barrows v. Jackson*, 346 U.S. 249, 259 (1953)). That is frequently true with discrimination in violation of Title IX.

Often, the persons protected by Title IX are students and minors. They are generally poorly situated to recognize discrimination or to raise complaints about it. Adult employees of schools are far better positioned both to identify potential Title IX violations and to bring them to the attention of school administrators in a way that will result in voluntary compliance with Title IX's requirements.

For example, the high school girls on petitioner's basketball team were unlikely to have access to information detailing the allocation of resources to their team as compared to similarly situated boys' teams. And, even if the girls knew or sensed that they were being short-changed, they may well have been unaware that there was anything they could do about it. Even if they were aware of their rights, as minors and students, they may have been reluctant to complain, for fear of displeasing those in authority, who they recognized exercised significant control over their day-to-day lives at school.

Girls like those on petitioner's team need advocates like petitioner to stand up for their right to equal treatment. If petitioner and others like him are deterred from complaining because of fear of retaliation, one of the most effective means of Title IX enforcement will be foreclosed. Thus,

protection for teachers and coaches who complain about discrimination directed primarily against students is vital to achieving Title IX's goal of rooting out sex discrimination in educational programs that receive federal funds.

D. Restricting Retaliation Protection To "Direct Victims" Would Be Difficult To Implement And, In Any Event, Would Not Justify Dismissing Petitioner's Complaint

Not only is there no legal basis for restricting the protection that Title IX provides against retaliation to so-called "direct victims," but such a restriction would be extremely difficult to administer. An attempt to distinguish between those directly harmed by discrimination and those harmed only indirectly would unnecessarily complicate discrimination cases with subtle factual and legal questions about who is and who is not a "direct" victim of discrimination. Resolving those questions would distract judges and juries from the real and important issues presented by the cases, and Title IX's goal of providing effective protection for discrimination victims would be frustrated.

This case illustrates the elusiveness of the court of appeals' proposed distinction between direct and indirect victims. The court of appeals blithely assumed that petitioner was not directly harmed by the sex discrimination about which he complained. *See* Pet. App. 23a. But that assumption ignores both the allegations in petitioner's complaint and the reality that the working lives of teachers and coaches are inextricably intertwined with the educational experiences of the students in their charge.

Petitioner alleged and thus is entitled to the opportunity to prove that he was directly harmed by the discriminatory treatment that he protested. Petitioner was the coach of a high school girls' basketball team, and he complained that the girls' team was denied equal funding and equal access to

sports facilities and equipment. J.A. 10-11; Pet. App. 3a. It was petitioner's responsibility as coach to help the team perform to its maximum potential, and the discrimination against the team impaired his ability to perform that job. Inadequate funding, equipment, and facilities have a direct adverse effect on a team's performance. And, to the extent that the players on petitioner's team were aware of the unequal funding and access to equipment and facilities, the discrimination may also have adversely affected their performance by damaging their self-esteem and morale. Moreover, to the extent that the team had to use the athletic facilities at inconvenient times or under uncomfortable conditions, petitioner, as the team's coach, suffered the same inconvenience and discomfort as the girls on the team.

In addition, because the girls' team was valued less highly by respondent than the boys' teams, petitioner's status as coach of the girls' team was diminished both in his view and the view of the educational community. Thus, because he was provided with unequal, less desirable terms of employment simply because he was the coach of a girls' rather than a boys' team, petitioner was discriminated against on the basis of sex, as he alleged in his amended complaint. See J.A. 10-11 (alleging that respondent "refuse[d] to contract with [petitioner] on terms free of gender" and that he "was subjected to adverse terms of employment because of gender discrimination").

Thus, petitioner alleged, and must be allowed to prove, that he was a "direct" victim of the sex discrimination about which he complained. The court of appeals' alternative holding would therefore be insufficient to support its judgment even if it were correct.

But that holding is not correct, as petitioner's situation and the court's failure to appreciate the direct harms that he suffered illustrate. Teachers and coaches are frequently harmed by discrimination directed primarily at their students,

and students are frequently harmed by retaliation or other discrimination directed primarily at their teachers and coaches.[12] Extensive factual inquiries designed to classify victims of discrimination as "direct" or "indirect" would be a needless and counterproductive distraction from the purpose and mandate of Title IX – the elimination of *all* discrimination based on sex from educational programs and activities receiving federal financial assistance.

CONCLUSION

For all of the reasons given above, the decision of the Eleventh Circuit should be reversed.

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[12] For example, the retaliation against petitioner likely harmed not only him, but also the girls on the team, as well as girls in the school (and perhaps the school district) generally. Petitioner's demotion likely reinforced the impression and the reality that the girls' team was less valued than the boys' team. In addition, petitioner's demotion deprived the girls of the benefit of his coaching abilities.

APPENDIX A

STATUTORY PROVISIONS INVOLVED

Pertinent provisions of Title IX of the Education Amendments of 1972 are codified at 20 U.S.C. §§ 1681 *et seq*. as follows:

§ 1681. Sex

(a) Prohibition against discrimination; exceptions.

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, except that:

(1) Classes of educational institutions subject to prohibition.

in regard to admissions to educational institutions, this section shall apply only to institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education;

(2) Educational institutions commencing planned change in admissions.

in regard to admissions to educational institutions, this section shall not apply (A) for one year from June 23, 1972, nor for six years after June 23, 1972, in the case of an educational institution which has begun the process of changing from being an institution which admits only students of one sex to being an institution which admits students of both sexes, but only if it is carrying out a plan for such a change which is approved by the Secretary of Education or (B) for seven years from the date an educational institution begins the process of changing from being an institution which admits only students of only one

sex to being an institution which admits students of both sexes, but only if it is carrying out a plan for such a change which is approved by the Secretary of Education, whichever is the later;

(3) Educational institutions of religious organizations with contrary religious tenets.

this section shall not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization;

(4) Educational institutions training individuals for military services or merchant marine.

this section shall not apply to an educational institution whose primary purpose is the training of individuals for the military services of the United States, or the merchant marine;

(5) Public educational institutions with traditional and continuing admissions policy.

in regard to admissions this section shall not apply to any public institution of undergraduate higher education which is an institution that traditionally and continually from its establishment has had a policy of admitting only students of one sex;

(6) Social fraternities or sororities; voluntary youth service organizations.

this section shall not apply to membership practices--

(A) of a social fraternity or social sorority which is exempt from taxation under section 501(a) of Title 26, the active membership of which consists primarily of students in attendance at an institution of higher education, or

(B) of the Young Men's Christian Association,

Young Women's Christian Association, Girl Scouts, Boy Scouts, Camp Fire Girls, and voluntary youth service organizations which are so exempt, the membership of which has traditionally been limited to persons of one sex and principally to persons of less than nineteen years of age;

(7) Boy or Girl conferences.

this section shall not apply to-

(A) any program or activity of the American Legion undertaken in connection with the organization or operation of any Boys State conference, Boys Nation conference, Girls State conference, or Girls Nation conference; or

(B) any program or activity of any secondary school or educational institution specifically for--

(i) the promotion of any Boys State conference, Boys Nation conference, Girls State conference, or Girls Nation conference; or

(ii) the selection of students to attend any such conference;

(8) Father-son or mother-daughter activities at educational institutions.

this section shall not preclude father-son or mother-daughter activities at an educational institution, but if such activities are provided for students of one sex, opportunities for reasonably comparable activities shall be provided for students of the other sex; and

(9) Institution of higher education scholarship awards in "beauty" pageants.

this section shall not apply with respect to any scholarship or other financial assistance awarded by an institution of higher education to any individual because such individual

has received such award in any pageant in which the attainment of such award is based upon a combination of factors related to the personal appearance, poise, and talent of such individual and in which participation is limited to individuals of one sex only, so long as such pageant is in compliance with other nondiscrimination provisions of Federal law.

(b) Preferential or disparate treatment because of imbalance in participation or receipt of Federal benefits; statistical evidence of imbalance.

Nothing contained in subsection (a) of this section shall be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federally supported program or activity, in comparison with the total number or percentage of persons of that sex in any community, State, section, or other area: *Provided,* That this subsection shall not be construed to prevent the consideration in any hearing or proceeding under this chapter of statistical evidence tending to show that such an imbalance exists with respect to the participation in, or receipt of the benefits of, any such program or activity by the members of one sex.

(c) "Educational institution" defined.

For purposes of this chapter an educational institution means any public or private preschool, elementary, or secondary school, or any institution of vocational, professional, or higher education, except that in the case of an educational institution composed of more than one school, college, or department which are administratively separate units, such term means each such school, college, or department.

§ 1682. Federal administrative enforcement; report to Congressional committees

Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 1681 of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made, and shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law: *Provided, however,* That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances

and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.

APPENDIX B

REGULATORY PROVISIONS INVOLVED

Pertinent provisions of the federal regulations effectuating Title VI of the Civil Rights Act of 1964 are published at 34 C.F.R. part 100 as follows:

§ 100.7 Conduct of investigations.

. . .

(e) *Intimidatory or retaliatory acts prohibited.* No recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by section 601 of the Act or this part, or because he has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under this part. The identity of complainants shall be kept confidential except to the extent necessary to carry out the purposes of this part, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder.

Pertinent provisions of the federal regulations effectuating Title IX of the Education Amendments of 1972 are published at 34 C.F.R. part 106 as follows:

§ 106.71 Procedures.

The procedural provisions applicable to title VI of the Civil Rights Act of 1964 are hereby adopted and incorporated herein by reference. These procedures may be found at 34 CFR 100.6-100.11 and 34 CFR, Part 101.